No. 16,552

United States Court of Appeals

For the Ninth Circuit

HARRY JOSEPH PAYNE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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JURISDICTION

Jurisdiction is founded under Title 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

Appellant, confined in Alcatraz Penitentiary, filed an application for Writ of Habeas Corpus on January 14, 1959, and an Order to Show Cause was then issued by Judge Lloyd H. Burke. After arguments and briefs were submitted, Judge George B. Harris denied the issuance of the Writ and discharged the Order to Show Cause in an opinion handed down on June 25, 1959.

STATEMENT OF THE FACTS

On March 16, 1956, in the Eastern District of Tennessee, Southern Division, appellant was sentenced under six informations and one indictment, numbered consecutively from 10676 to 10682. The transcript of the sentencing of the appellant is as follows:

> "The Court. '. . . The first count of No. 10,676 is a charge of first uttering and publishing as well as having in possession, that is probably two different things, anyway I am putting one year on each count, concurrent.
>
> 'No. 10,677 is breaking into a post office at Campaign, Illinois, the second count is stealing the money orders at the time. So, I am just putting that as two years on the first count and one year on the other, making it concurrent or making two years for that charge.
>
> 'No. 10,678 I will have to start back, 10,678 as I have it now corrected. In that case you are charged with breaking into a post office at Nunnelly, Tennessee, secondly stealing property from the postal department, which I assume to be the same offense. And 10,678, two years on the first count, one year on the second count, concurrent. That is the way I have got that.
>
> 'Now, No. 10,679, is breaking in two different post offices, one at Hurricane Mills and the other one at Nunnelly, the same thing. I have No. 10,679 as two years on the first count, and one year on the second count concurrent.
>
> 'No. 10,680, is a one-count indictment, breaking into the post office aat Dukedom, Weakly County, two years on that.

'No. 10,681, is from the Eastern District of Wisconsin, cashing two money orders as I get it. One year on each count, concurrent.'

'And then the last No. 10,682, breaking and entering the post office building in the Western District of Missouri that is two years, and all the different indictments will be consecutive. Now, let's see that is thirteen years, is that correct?'

Gen'l Meek. 'I figure twelve.'

Mr. Thrasher. 'I figure twelve.'

Clerk. 'Thirteen is right.'

The Court. 'I figure fourteen. One as I say it was involving the same instance, I took off one.

Did you get it, Mr. Thrasher? 10,676, one year; 10,677 two years; 10,678 two years; 10,679, two years; 10,680 two years, 10,681 is two years, 10,682 is two years, consecutive as to all cases.'

Gen'l Meek. '10,681, how is that?'

The Court. 'It is two years.' ''

* * * * *

Appellant now contends that the total sentence imposed upon him was only two years.

QUESTION PRESENTED

Did the sentencing court properly impose consecutive sentences upon the appellant?

ARGUMENT

The basis of appellant's contention is a dictum in the case of *United States v. Patterson,* (C.C.), 29 F.

775, to the effect that where consecutive sentences are intended by the sentencing judge, the specific order of service must be directed and cannot in any way be implied. The *Patterson* case is also cited for the proposition that the sentencing judge's failure to direct that a second sentence, pronounced consecutive to the first, will begin from and after the service of the first, will make the sentences concurrent, even though the judge has made clear his intention to impose consecutive sentences. In the case of *United States v. Daugherty,* 269 U.S. 360, the Supreme Court relaxed the formalistic rule of the *Patterson* case holding that:

> " 'Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded.' "

It distinguished *Patterson* on the grounds that in *Patterson* separate indictments were involved, whereas in *Daugherty* the sentences were pronounced on different counts of the same indictment, which indictment provided a ready and obvious order in which the sentences could be served. The question before this Court is whether, under the rule announced in *United States v. Daugherty,* the intent of the sentencing court was sufficiently definite so as to "exclude any serious misapprehensions by those who must execute." We wish to make clear that the case before this Court is not whether the total sentence imposed upon this appellant is twelve years, thirteen years, or fourteen years, but merely whether the appel-

lant has no right to be released after serving two years.

Several cases have applied the *Daugherty* rule to situations similar to that before the bar here. In the case of *Kennedy v. Reid,* 249 F. 2d 492 (D.C. Cir.), the Court was faced with a situation where the District Judge imposed consecutive sentences in indictments 438-54, 439-54, and 440-54 without specifying the order in which the sentences were to be served except that he said that the second was to be consecutive to the first and the third to be consecutive to the second. Through an error, the commitment stated that the sentences were to be served concurrently. When this error was discovered and appellant reimprisoned, he brought Habeas Corpus.

Two issues were before the Court; first, whether the commitment could be modified to correct the clerk's error and reflect the original sentence of the Court, and secondly, whether the sentence pronounced by the Court was sufficiently definite. As to both questions, the Court of Appeals held in the affirmative, provoking a dissent from Judge Fahy on the ground, among others, that the sentence was not sufficiently definite. Judge Fahy in his dissent stated:

> "If the distinction of *Patterson,* drawn by the Supreme Court in *Daugherty* (that of separate counts of the same indictments) is not thought to be altogether persuasive—or if it is thought that *Patterson* is too technical—there are factors of substance here not present in *Patterson* which do persuade that the result reached in *Patterson* should be reached here."

In the case of *Barker v. Looney,* 261 F. 2d 616, the 10th Circuit was faced with a situation very similar to the instant one. There, on a series of six indictments, the trial judge sentenced the appellant to six five-year terms, stating at the end ". . . and each of the sentences will run consecutively." The commitment provided an order to the sentences as does the commitment in this case. The 10th Circuit, in a per curiam opinion stated:

> "The basis for the application for the writ is that the sentences were so indefinite and uncertain as to render them void. The trial court found, after a full hearing, that the sentences orally imposed by the court were reasonably definite, certain and consistent, and that the fair and reasonable intendment of the several sentences imposed on Paul Dean Barker was that in the order of their pronouncement the second was to run consecutively with the first; the third consecutively with the second; the fourth consecutively with the third; the fifth consecutively with the fourth; and the sixth consecutively with the fifth, and that there was no conflict between the oral sentences imposed and the written judgment and commitment signed by the trial judge."
>
> "We think the sentences, on their face, 'with fair certainty' disclose 'the intent of the' sentencing 'court,' as found by the court below in the instant case, and the order is therefore affirmed.[1]'"

"[1]See *United States v. Daugherty,* 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309."

A District Court case on the same point is *Cole v. Sanford,* 48 F. Supp. 729 (N.D. Ga.). There the

Court, dealing with two consecutively numbered indictments, stated:

> "It seems to me, therefore, that this is a case where one may state 'with fair certainty,' if not with confidence, that the language used, in the circumstances shown, reveals the intent of the Court to make the sentence in number 9392 commence to run after the completion of the sentence in number 9391, and excludes 'any serious misapprehensions by those who must execute them.'"

Lastly, in the case of *Fleish v. Swope,* 9th Cir., 226 F. 2d 310, the Court dealt with sentences under different counts of the same indictment. However, the language of the Court is easily applicable to this matter. As the Court in its per curiam opinion stated:

> "Apparently appellant's argument is that if the judge who imposed the sentence required three seconds to pronounce or read each item of the quoted judgment then each sentence on Count 3 began three seconds after his sentence on Count 1, and that in like manner each term thereafter named began three seconds after the preceding one. The argument is that was the literal meaning and effect of the judgment rendered by the court and that terms of imprisonment so construed would, as a matter of law, run 'consecutively.' . . .
>
> As for the sufficiency of the judgment to provide, as the court obviously intended, that the terms of five years should be served consecutively and to follow each other in sequence, this court's decision in *Lipscomb v. Madigan,* 9 Cir., 224 F. 2d 410, is sufficient authority."

The Government respectfully contends that there is no possible prejudice to the appellant in the manner in which the consecutive sentences were pronounced and that this Court should not apply any formalistic rule which would violate the spirit of the *Daugherty* case, the subsequent cases interpreting *Daugherty* and the obvious intention of the trial judge.

Accordingly, the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
September 10, 1959.

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